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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1164~~ 138

THE EXCHANGE NATIONAL BANK OF OLEAN,
Petitioner,

vs.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	3
Argument	6
The Court of Appeals failed to give proper application to the decisions of this court establishing rules for the determination of questions of State law	6
Point I. Under the controlling decisions of this court the Court of Appeals was not free to disregard the considered judgment of the New York Appellate Division	7
Point II. Certiorari should be granted in order to implement the principle enunciated by this court that a change in venue should not cause a change in the outcome of a case	11
Conclusion	13
Appendix—Opinion of the United States Court of Appeals for the Second Circuit	14

Table of Cases.

In re Baughman's Estate, 281 Pa. 231, 126 A. 56 (1924)	11
Bernhardt v. Polygraphic Co., 350 U. S. 198 (1956)	12
Chance v. Guaranty Trust Co. of New York, 164 Misc. 346, 298 N. Y. Supp. 17 (Supreme Court Kings Co. 1937), aff'd 251 A. D. 855, 297 N. Y. Supp. 293 (2nd Dept. 1937)	8
Commonwealth v. National Surety Co., 349 Pa. 599, 37 A. 2d 743 (1944)	11
In re Craver's Estate, 319 Pa. 282, 179 A. 606 (1935)	11

PAGE

Erie R. Co. v. Tompkins, 304 U. S. 64 (1938) 12
Fidelity Trust Co. v. American Sur. Co. of New York, 268 F. 2d 805 (1959) 4, 5, 7, 8, 11
First National Bank of South Carolina v. Glens Falls Ins. Co., 304 F. 2d 866 (C. A. 4th, 1962) 7
General Electric Co. v. Hygrade Sylvania Corporation, 61 F. S. 476, 525-6 (S. D. N. Y. 1944) 9
General Motors Acceptance Corporation v. Foley, 311 Pa. 477, 166 A. 909 (1933) 11
Gillespie v. United States Steel Corporation, 321 F. 2d 518, 529-30 (C. A. 6th, 1963), modified, 85 S. Ct. 308 (1964) 9
Goodson v. United States, 151 F. S. 416 (D. Minn. 1957), aff'd 253 F. 2d 900 (C. A. 8th, 1958) 9
Guaranty Trust Co. of New York v. York, 326 U. S. 99 (1945) 12
Johnstown Bank v. American Sur. Co. of New York, 6 A. D. 2d 4, 174 N. Y. S. 2d 385 (3rd Dept. 1958), motion for leave to appeal denied, 5 N. Y. 2d 705, 153 N. E. 2d 796, 179 N. Y. S. 2d 1026 (1958) 9
Koslow v. Morrison, 4 M. 2d 158, 160 N. Y. S. 2d 455 (Sup. Ct. Kings Co. 1956) 8
Matter of Weeks, 294 N. Y. 516, 63 N. E. 2d 85 (1945), motion for reargument denied, 294 N. Y. 979, 63 N. E. 2d 712 (1945) 8
Musser v. Stauffer, 178 Pa. 99, 35 A. 709 (1896), 192 Pa. 398, 43 A. 1018 (1899) 11
Prudential Capital Corp. v. Royal Indem. Co., 21 A. D. 2d 664, 249 N. Y. S. 2d 728 (1964) 2, 4, 5, 7, 10
Rennekamp v. Blair, 375 Pa. 620, 101 A. 2d 669 (1954) 11
Six Companies of California v. Joint Highway District, 311 U. S. 180 (1940), rehearing denied, 311 U. S. 730 (1941) 6, 9
Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940), rehearing denied, 312 U. S. 713 (1941) 6, 9
VanDusen v. Barrack, 376 U. S. 612 (1964) ..2, 4, 5, 7, 12, 13
Waggaman v. General Finance Co., 116 F. 2d 254 (C. A. 3rd, 1940) 11
West v. American Telephone & Telegraph Co., 311 U. S. 223 (1940) 6, 9

Statutes.

	PAGE
28 U. S. C. § 1254	2
28 U. S. C. § 1332	3
28 U. S. C. § 1391	3
28 U. S. C. § 1404(a)	3

Miscellaneous.

Restatement, Conflict of Laws § 622	11

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THE EXCHANGE NATIONAL BANK OF OLEAN,
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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit herein, and respectfully shows:

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 341 F. 2d 673, and is printed as an appendix to this petition. The opinion of the United States District Court for the Western District of New York is incorporated in its decision and order, which has not been reported, but which is printed at pages 77-82 of the Joint Appendix, copies of which are being filed with this petition.

Jurisdiction

1. The judgment of the Court of Appeals was rendered on February 19, 1965 and was entered by the clerk on the same day.

2. An order denying a petition for rehearing was made and entered on March 12, 1965. There has been no order granting an extension of time within which to petition for certiorari.

3. Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred by the provisions of 28 U. S. C. § 1254.

Questions Presented for Review

1. Whether the Court of Appeals, in determining that the law of New York is unsettled on the issue of coverage by a Bankers' Blanket Bond for losses on loans secured by the assignment of fictitious accounts receivable evidenced by spurious invoices and bills of lading in the absence of a forged signature, failed to accord appropriate respect to the opinion of the New York Appellate Division, First Department, in *Prudential Capital Corp. v. Royal Indem. Co.*, 21 A. D. 2d 664, 249 N. Y. S. 2d 728 (1964).

2. Whether the Court of Appeals, after concluding that the New York law was unsettled on that issue, departed from the principles established by this court in *VanDusen v. Barrack*, 376 U. S. 612 (1964) in proceeding to exercise the choice that a New York State court would possess in resolving that issue despite the fact that the case had been transferred from the Eastern District of Pennsylvania and that a court sitting in Pennsylvania would have reached precisely the opposite result by following the Pennsylvania conflict of laws rule that in the absence of a showing to

the contrary it would be presumed that the law of New York was the same as that of Pennsylvania.

Statement of the Case

It is alleged in Paragraph 1 of the complaint (2-3)[1], and admitted in the answer (45), that the petitioner is a national banking corporation located at Olean in the Western District of New York, that respondent is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and that the matter in controversy exceeds $10,000. The home office of the respondent is in Philadelphia in the Eastern District of Pennsylvania (50). The action was brought in the United States District Court for the Eastern District of Pennsylvania, jurisdiction being based upon diversity of citizenship and the amount in controversy under 28 U. S. C. § 1332, and venue being based upon the residence of the respondent under 28 U. S. C. § 1391. The action was transferred to the Western District of New York under 28 U. S. C. § 1404(a) upon the respondent's motion (53-54).

The suit is for losses incurred by the petitioner arising out of loans to Fibre Forming Corporation which were evidenced by collateral notes, the collateral being the assignment of ostensible accounts receivable supported by copies of invoices and bills of lading. It developed that the accounts receivable were fictitious and that the copies of invoices and bills of lading were spurious, there being no corresponding actual invoice issued by Fibre Forming Corporation and no actual bill of lading to cover the shipment of goods described in the invoice, but there was no claim that any signature was forged (82-83).

[1] References of this type are to the pages of the Joint Appendix in the Court of Appeals, copies of which have been filed in this court.

The bond upon which suit was brought specifically excluded from coverage any loss arising out of any loan "except when covered by Insuring Clause (A), (D) or (E)" (15). It is petitioner's position that coverage is provided under Insuring Clause (E). That clause provides coverage for losses through having "in good faith and in the course of business * * * extended any credit * * * on the faith of * * * any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any other person signing in any other capacity, or raised or otherwise altered or lost of stolen * * *" (11-12). The issue is as to whether this clause provides coverage for the losses sustained through reliance upon the spurious invoices and bills of lading.

Before this action was instituted, and even before the bond had been issued, the Court of Appeals for the Third Circuit in a case involving Pennsylvania law had held in a parallel situation that coverage was provided. *Fidelity Trust Co. v. American Sur. Co. of New York,* 268 F. 2d 805 (1959).

At the time when the District Court granted the respondent's motion for summary judgment it did not have the benefit of the decisions in *Prudential Capital Corp. v. Royal Indem. Co.,* 21 A. D. 2d 664, 249 N. Y. S. 2d 728 (1st Dept. 1964), or *VanDusen v. Barrack,* 376 U. S. 612 (1964). Consequently finding no controlling New York law, it proceeded to decide the case with reference to authorities from various jurisdictions without making any effort to determine what decision would be reached by a court sitting in Pennsylvania. It concluded that the words "as to the

signature" modify "counterfeited" as well as "forged" and held that there was no coverage for counterfeit documents containing no false signature (77-82).

Although the Court of Appeals had the case of *Prudential Capital Corp. v. Royal Indem. Co.*, 21 A. D. 2d 664, 249 N. Y. S. 2d 728 (1st Dept. 1964), *supra*, before it, it concluded that the law of New York was unsettled. The court referred to *Fidelity Trust Co. v. American Sur. Co. of New York*, 268 F. 2d 805 (C. A. 3rd, 1959), *supra*, as representing the law of Pennsylvania but stated that it did not regard this as binding upon it even though it recognized that under the decision of this court in *VanDusen v. Barrack*, 376 U. S. 612 (1964), *supra*, the law of Pennsylvania was to be applied, including the rules relating to conflict of laws. It then proceeded to exercise the choice which it felt that a New York State court would possess and held that the invoices could not be considered "counterfeit" within the meaning of Insuring Clause (E). The petition for rehearing called to the attention of the Court of Appeals the fact that a court sitting in Pennsylvania, upon finding the law of New York unsettled, would have considered itself bound to follow the Pennsylvania law as enunciated in *Fidelity Trust Co. v. American Sur. Co. of New York*, 268 F. 2d 805 (C. A. 3rd, 1959), *supra*, under the established Pennsylvania conflict of laws rule that in the absence of a showing to the contrary it will be presumed that the law of a sister state is the same as the law of Pennsylvania.

ARGUMENT

The Court of Appeals failed to give proper application to the decisions of this court establishing rules for the determination of questions of State law.

The Court of Appeals properly held: (1) that this diversity action was properly commenced in a District Court in Pennsylvania; (2) that the law of Pennsylvania is applicable; (3) that this includes the Pennsylvania law relating to conflict of laws; and (4) that under the Pennsylvania conflict of laws rule the interpretation of the bond would be governed by the internal law of New York.

In concluding, however, that the internal law of New York is unsettled, the Court of Appeals, in the absence of any indication that the highest court of New York would decide otherwise, disregarded the considered judgment of the New York Appellate Division, First Department, contrary to the rule laid down by this court in *West v. American Telephone & Telegraph Co.*, 311 U. S. 223 (1940), *Stoner v. New York Life Ins. Co.*, 311 U. S. 464 (1940), rehearing denied, 312 U. S. 713 (1941), and *Six Companies of California v. Joint Highway District*, 311 U. S. 180 (1940), rehearing denied, 311 U. S. 730 (1941).

After concluding that the internal law of New York is inconclusive the Court of Appeals proceeded to a determination of the question on its own initiative, exercising what it considered to be the choice that a New York State court would possess. Instead of proceeding in this manner a court sitting in Pennsylvania, applying the Pennsylvania conflict of laws rule, would have presumed that the New York law is the same as the Pennsylvania law and would have reached a result opposite to that reached by the Court of Appeals. In deciding the question upon the basis of its

own predilections rather than upon the basis of the Pennsylvania conflict of laws rule the Court of Appeals has made the transfer of the case result in a change in its outcome, contrary to the principle enunciated in *VanDusen v. Barrack*, 376 U. S. 612 (1964).

POINT I

Under the controlling decisions of this court the Court of Appeals was not free to disregard the considered judgment of the New York Appellate Division.

There was a conflict of authority on the principal question presented by this case, whether fictitious invoices and bills of lading constitute counterfeit documents within the coverage of Insuring Clause (E) of the bond. The leading case for coverage is *Fidelity Trust Co. v. American Sur. Co. of New York*, 268 F. 2d 805 (C. A. 3rd, 1959), which the Court of Appeals in this case accepted as stating the law of Pennsylvania, but which it chose not to follow. The leading case against coverage is *First National Bank of South Carolina v. Glens Falls Ins. Co.*, 304 F. 2d 866 (C. A. 4th, 1962).

In *Prudential Capital Corp. v. Royal Indem. Co.*, 21 A. D. 2d 664, 249 N. Y. S. 2d 728 (1st Dept. 1964), loans had been made by a factor on fictitious accounts receivable and suit was brought on a Brokers' Blanket Bond, Standard Form No. 14, containing an Insuring Clause (E) identical in all material respects to the one contained in the bond in the instant case. The Special Term granted plaintiff's motion for summary judgment, citing the case of *Fidelity Trust Co. v. American Sur. Co. of New York*, 268 F. 2d 805 (C. A. 3rd, 1959), *supra*, as authority (N. Y. L. J. December 17, 1963). Since there was a dispute as to the amount

of damages the court ordered a trial for the sole purpose of assessing the damages. The Appellate Division found that there were triable issues and reversed the order of summary judgment, which had the effect of sending the case back for trial. This disposition of the case made it unnecessary for the Appellate Division to pass upon the question of interpretation of the bond. The defendant in its brief, however, argued that the *Fidelity Trust Co. v. American Sur. Co. of New York* case répresented a minority view which should not be followed and after citing the cases reaching the opposite result urged the court to determine the question of the proper interpretation of the bond as a guide for further proceedings in the case. The point was also fully briefed by the plaintiff. As requested by the bonding company the Appellate Division did consider the question of interpretation of the bond and decided to follow the decision in *Fidelity Trust Co. v. American Sur. Co. of New York.* Consequently this expression of opinion was not "mere dictum" or *"obiter dictum"*, which the Court of Appeals was free to disregard, but constituted the Appellate Divisions considered judgment on a question raised by the case and fully argued and was designed for guidance of the trial court in subsequent proceedings. Such a deliberate expression, even though termed "considered dictum" or "judicial dictum", has the same weight as a decision.

Chance v. Guaranty Trust Co. of New York, 164 Misc. 346, 298 N. Y. Supp. 17 (Supreme Court Kings Co. 1937), aff'd 251 A. D. 855, 297 N. Y. Supp. 293 (2nd Dept. 1937);

Matter of Weeks, 294 N. Y. 516, 63 N. E. 2d 85 (1945), motion for reargument denied, 294 N. Y. 979, 63 N. E. 2d 712 (1945);

Koslow v. Morrison, 4 M. 2d 158, 160 N. Y. S. 2d 455 (Sup. Ct. Kings Co. 1956);

General Electric Co. v. Hygrade Sylvania Corporation, 61 F. S. 476, 525-6 (S. D. N. Y. 1944);
Gillespie v. United States Steel Corporation, 321 F. 2d 518, 529-30 (C. A. 6th, 1963), modified, 85 S. Ct. 308 (1964);
Goodson v. United States, 151 F. S. 416 (D. Minn. 1957), aff'd 253 F. 2d 900 (C. A. 8th, 1958).

In the absence of persuasive data that the New York Court of Appeals would decide otherwise the Court of Appeals for the Second Circuit was obliged to accept this statement of the Appellate Division as an authoritative expression of the New York law.

West v. American Telephone & Telegraph Co., 311 U. S. 223 (1940);
Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940), rehearing denied, 312 U. S. 713 (1941);
Six Companies of California v. Joint Highway District, 311 U. S. 180 (1940), rehearing denied, 311 U. S. 730 (1941).

The only additional datum referred to by the Court of Appeals with respect to New York law was the case of *Johnstown Bank v. American Sur. Co. of New York,* 6 A. D. 2d 4, 174 N. Y. S. 2d 385 (3rd Dept. 1958), motion for leave to appeal denied, 5 N. Y. 2d 705, 153 N. E. 2d 796, 179 N. Y. S. 2d 1026 (1958). That case was similar to the instant case except that there instead of making loans the bank purchased assignments, without recourse, of conditional contracts of sale from an automobile dealer. The contracts had been signed by friends and relatives of the dealer, but no automobiles had actually been sold. The court decided that the Bankers' Blanket Bond, in all respects similar to the one in this case, provided coverage under Insuring Clause (B) and that recovery was not barred by the Exclusion Clause, which relates only to loss-

es resulting from "loans", since these transactions constituted "purchases" rather than "loans". The court stated that if there had been proof of a custom to classify this type of transaction as a loan there would be considerable force to the argument that the Exclusion Clause would be applicable. In that situation, as in this case, coverage under Insuring Clause (B) would be excluded, and the question would be presented whether there was coverage under Insuring Clause (E), which is not eliminated by the Exclusion Clause. After concluding, however, that there was no proof to authorize such a finding, the court pointed out that the trial court had not found it necessary to determine whether coverage was also provided by Insuring Clause (E), then concluded "and likewise we do not pass upon that issue in view of the foregoing observations." An examination of the briefs in that case discloses that although the brief for the bank included a point in which the cases supporting coverage under Insuring Clause (E) were cited, the brief for the bonding company did not refer to the contrary line of decisions or argue this point. Similarly, upon its application for leave to appeal to the New York Court of Appeals the bonding company made no reference in its papers to the cases interpreting Insuring Clause (E). Certainly the fact that the court found coverage under Insuring Clause (B) cannot be taken as any indication that it would not have also found coverage under Insuring Clause (E), especially in view of its express statement that it was not passing upon that issue. Hence it is apparent that there is nothing in that case in any way impairing the authority of the *Prudential Capital Corporation* case or in any way forming a basis for the Court of Appeals for the Second Circuit to conclude that the New York Court of Appeals would reach a result differing from the view expressed by the Appellate Division for the First Department.

POINT II

Certiorari should be granted in order to implement the principle enunciated by this court that a change in venue should not cause a change in the outcome of a case.

After concluding (erroneously according to our argument under Point I) that the law of New York is unsettled on the issue of the proper interpretation of Insuring Clause (E), the Court of Appeals proceeded to attempt to "exercise the choice that a New York State court would possess." In doing so it apparently failed to bear in mind that it should be acting like a Pennsylvania court, not a New York court. If a court sitting in Pennsylvania had determined, as the Court of Appeals did in this case, that the New York law on the issue is unsettled, it would have followed the decision in *Fidelity Trust Co. v. American Sur. Co. of New York,* 268 F. 2d 805 (C. A. 3rd, 1959), *supra,* applying the well established Pennsylvania conflict of laws rule that in the absence of a showing to the contrary it will be presumed that the applicable law of a sister state is the same as the law of Pennsylvania.

Restatement, Conflict of Laws §622;

Musser v. Stauffer, 178 Pa. 99, 35 A. 709 (1896), 192 Pa. 398, 43 A. 1018 (1899);

In re Baughman's Estate, 281 Pa. 231, 126 A. 56 (1924);

General Motors Acceptance Corporation v. Foley, 311 Pa. 477, 166 A. 909 (1933);

In re Craver's Estate, 319 Pa. 282, 179 A. 606 (1935);

Commonwealth v. National Surety Co., 349 Pa. 599, 37 A. 2d 743 (1944);

Rennekamp v. Blair, 375 Pa. 620, 101 A. 2d 669 (1954);

Waggaman v. General Finance Co., 116 F. 2d 254, (C. A. 3rd, 1940).

The doctrine established by this court in *VanDusen v. Barrack*, 376 U. S. 612 (1964), *supra*, is a corollary of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938). Just as a nonresident can no longer avail himself of a different rule of law in a diversity case by resort to the federal courts, so the change of venue resulting from the liberalized transfer procedure is not now to be used to affect the result of a case. A significant area of difficulty in applying the rule of *Erie R. Co. v. Tompkins* has been in distinguishing between matters of substance where the state rules are governing and matters of procedure where the federal courts are free to follow their own rules. The guiding principle has evolved that a matter is substantive if it has the effect of changing the outcome of a case.

Guaranty Trust Co. of New York v. York, 326 U. S. 99 (1945);
Bernhardt v. Polygraphic Co., 350 U. S. 198 (1956).

This same principle should serve as a guide in implementing the doctrine of *VanDusen v. Barrack*. The presumption that the law of a sister state is the same as that of the forum may be classified for some purposes as a rule of evidence or of procedure. It is a thoroughly established rule of conflict of laws, however, and where applicable may be determinative of the outcome of a case. Clearly the decision of the Court of Appeals here to follow a line of authorities contrary to the established rule in Pennsylvania has brought about a different outcome of the suit than would have been reached by a court sitting in Pennsylvania applying the Pennsylvania conflict of laws rule. Such a result cannot be tolerated if the doctrine of *VanDusen v. Barrack* is to have life.

Conclusion

Certiorari should be granted because the Court of Appeals has failed to follow the rules laid down by this court as to the effect to be given to the decisions of intermediate appellate courts and because it has failed properly to apply the doctrine recently enunciated by this court in *Van-Dusen v. Barrack.*

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 184—September Term, 1964.

(Argued November 20, 1964 Decided February 19, 1965).

Docket No. 29121

THE EXCHANGE NATIONAL BANK OF OLEAN,
Plaintiff-Appellant,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Defendant-Appellee.

Before: Lumbard,
Chief Judge,

Medina and Marshall,
Circuit Judges.

Appeal from a judgment of the District Court for the Western District of New York, John O. Henderson, *Judge,* entered upon an order granting defendant's motion for summary judgment in an action on an indemnity bond. Affirmed.

Robert M. Diggs, Olean, New York (Hornburg, Diggs & Dwyer, on the brief), *for Plaintiff-Appellant.*

Richard E. Moot, Buffalo, New York (Ohlin, Damon, Morey, Sawyer & Moot, on the brief), *for Defendant-Appellee.*

MARSHALL, *Circuit Judge:*

Plaintiff, The Exchange National Bank of Olean, New York, commenced a diversity action in the Eastern District

of Pennsylvania to recover on an indemnity bond issued by defendant, Insurance Company of North America. Defendant moved under 28 U. S. C. § 1404(a) to have the case transferred to the Western District of New York and the motion was granted. We find no error in effecting this transfer, and our primary concern is with the merits, which were resolved by the court below by granting defendant's motion for summary judgment.

There is little dispute as to the essential facts. The loss for which the Bank seeks indemnification resulted from a default on a loan to Fibre Forming Corporation, a small company in Olean, wholly owned and run by its President, C. E. Nolan. Each of the loans was evidenced by a promissory note signed by Nolan and secured by the assignment of accounts receivable. Letters from Nolan listed the accounts and stated that they had been marked assigned to the Bank. The series of loans began in 1961 and by November 1962 the Bank became concerned because of the magnitude of unpaid balances. The Bank then insisted that copies of invoices and bills of lading be submitted to attest to the genuineness of the accounts receivable. The copies of the invoices were marked, as required by the Bank, "Certified true and Correct, C. E. Nolan." This was the signature of Nolan who had placed it on the invoices himself. But, as was discovered three months later, when the Bank notified Fibre Forming's customers to make direct payment to the Bank, many of these accounts receivable were nonexistent; the shipments shown on many of the invoices had not been completed at the time the loans were made. Bankruptcy proceedings were initiated and some of the receivables were paid to the Trustee in Bankruptcy. Of the $140,333.36 loaned, apparently almost $90,000 remained unpaid, and the Bank seeks indemnification under the bond for this amount.

The bond protected the Bank against many losses, but specifically excluded from coverage

> Any loss the result of the complete or partial nonpayment of or default upon any loan made by or obtained from the Insured, whether procured in good faith, or through trick, artifice, fraud or false pretenses, except when covered by Insuring Clauses (A), (D) or (E).

The loss suffered by the Bank resulted from defaults on loans, and the limitations on this exclusion derived from Insuring Clauses (A) and (D) are clearly inapplicable. Coverage is staked upon Insuring Clause (E).[1]

The Bank admits, as it must, that the signature of C. E. Nolan was not "forged" and that it cannot seek the benefit of Insuring Clause (E) on the theory that the invoices were "forged as to signature." Compare *Security National Bank of Durand v. Fidelity & Cas. Co. of New York*, 246 F. 2d

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[1] "SECURITIES

(E) Any loss through the Insured's having, in good faith and in the course of business, whether for its own account or for the account of others, in any representative, fiduciary, agency or any other capacity, either gratuitously or otherwise, purchased or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability, on the faith of, or otherwise acted upon any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any person signing in any other capacity, or raised or otherwise altered or lost or stolen, or through the Insured's having, in good faith and in the course of business, guaranteed in writing or witnessed any signatures, whether for valuable consideration or not and whether or not such guaranteeing or witnessing is *ultra vires* the Insured, upon any transfers, assignments, bills of sale, powers of attorney, guarantees, endorsements or other documents upon or in connection with any securities, obligations or other written instruments and which pass or purport to pass title to such securities, obligations or other written instruments; EXCLUDING HOWEVER, any loss through FORGERY OR ALTERATION of, on or in any checks, drafts, acceptances, withdrawal orders or receipts for the withdrawal of funds or Property, certificates of deposit, letters of credit, warrants, money orders or orders upon public treasuries; and excluding, further, any loss specified in subdivisions (1) and (2) of Insuring Clause (D) as printed in this bond, whether or not any amount of insurance is applicable under this bond to Insuring Clause (D).

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures."

582 (7 Cir. 1957), with *Fitzgibbons Boiler Co. v. Employers' Liab. Assur. Corp.*, 105 F. 2d 893 (2 Cir. 1939). The Bank invokes Clause (E), however, on the theory that the loss resulted from having "in good faith and in the course of business . . . extended . . . credit . . . on the faith of . . . securities, documents or other written instruments which . . . have been counterfeited." The contention is that the invoices certified by C. E. Nolan are "securities, documents or other written instruments" within the meaning of Clause (E), that credit was extended "in good faith" "on the faith of" these invoices, and that the invoices showing shipments not yet completed were counterfeit. We are of the opinion that the invoices could not be considered counterfeit. Judgment below is affirmed on that ground, and there is thus no need to evaluate the other propositions relied upon by the Bank in seeking the benefit of Clause (E).

The Third Circuit in *Fidelity Trust Co. v. American Sur. Co. of New York*, 268 F. 2d 805 (3 Cir. 1959), faced with an identical provision of a bankers' indemnity bond, held, in a diversity action in which Pennsylvania law governed, that invoices which purported to cover non-existent transactions were counterfeit, and that in such a situation Insuring Clause (E)'s limitation on the exclusion for loss due to default on loans was applicable. This is the law of Pennsylvania, which we have carefully considered but which we do not regard as binding upon us.

This diversity action was properly commenced in a district court in Pennsylvania, and then transferred under § 1404(a), upon defendant's motion, to a district court in New York. *Van Dusen v. Barrack*, 376 U. S. 612, 639 (1964), requires that this "change of courtrooms" not result in a change in the applicable state law; and thus the law of Pennsylvania is to be applied. However, *all* of the

law of Pennsylvania is to be applied, including the rules relating to conflict of laws, *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U. S. 487 (1941), and we are of the opinion that the conflict law of Pennsylvania, see generally, *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964), would refer us to the internal law of New York, not Pennsylvania. The bond was executed in Olean, New York; it was obtained through an agent of defendant located in Olean; the bank is situated in Olean; and presumably most of the transactions that might give rise to losses covered by the bond would occur there. Defendant's home office is in Pennsylvania, but that is not a sufficient reason for deferring to the interpretation adopted as the law of that state. The hope of achieving uniformity in the interpretation of the controverted clause by having the interpretation of the courts of the state of the home office control, cf. *Order of United Commercial Travelers of America v. Wolfe*, 331 U. S. 586, 592 (1947), is illusory in this case, since we are dealing with a standard clause used by innumerable insurance companies, whose home offices are scattered throughout the fifty states.

Although the internal law of New York, rather than the law of Pennsylvania governs, the law of New York is unsettled on this issue. Compare *Johnstown Bank v. American Sur. Co. of New York*, 6 App. Div. 2d 4, 174 N. Y. S. 2d 385 (3d Dept.), *motion for leave to appeal denied*, 5 N. Y. 2d 705, 153 N. E. 2d 796, 179 N. Y. S. 2d 1026 (1958) with *Prudential Capital Corp. v. Royal Indem. Co.*, 21 App. Div. 2d 664, 249 N. Y. S. 2d 728 (1st Dept. 1964). We exercise the choice that a New York state court would possess, and hold that these invoices cannot be considered "counterfeit" within the meaning of Insuring Clause (E). See generally, *North Carolina Nat'l Bank v. U. S. Cas. Co.*, 317 F. 2d 304 (4 Cir.), *cert. denied*, 375 U. S. 905 (1963); *First*

Nat'l Bank of South Carolina v. Glens Falls Ins. Co., 304 F. 2d 866 (4 Cir. 1962); *First Nat'l Bank of Memphis v. Aetna Cas. & Sur. Co.*, 309 F. 2d 702 (6 Cir. 1962), *cert. denied*, 372 U. S. 953 (1963); *United States Fid. & Guar. Co. v. First Nat'l Bank of Ft. Morgan*, 147 Col. 1446, 364 P. 2d 202 (1961); *First Am. State Bank v. Aetna Cas. & Sur. Co.*, 25 Wis. 2d 190, 130 N. W. 2d 824 (1964); for a similar result reached upon various theories.

A document or writing is counterfeit if it is an imitation, if it attempts to simulate another document or writing which is authentic. The deceptive and fraudulent quality of these invoices, however, arose, not from the effort to imitate or simulate authentic invoices, but from falsity of the implicit and explicit representations of fact, to wit, that certain goods had already been shipped to a customer. To hold that these invoices are counterfeit would obliterate elementary distinctions among the techniques of deception. These distinctions are recognized in ordinary and commercial usage and they are preserved in the bond. Not all defaulting loans obtained upon the basis of fraud and deception are covered. In fact, the bond generally excludes from coverage losses resulting from default on loans, regardless of whether the loan was procured through trick, artifice, fraud or false pretences; the limitation on this exclusion for loans fraudulently obtained through the use of counterfeit documents merely appears as an exception to the general exclusion. There is a difference between extending credit on the basis of pledged counterfeit stock certificates, a risk clearly within the purview of the bond, and extending credit on the basis of invoices that cover non-existent shipments and that have been submitted as evidence of previously pledged accounts receivable. The bank can verify the existence of the pledged accounts re-

ceivable by inquiring with the loan applicant's purported customer, while detecting a counterfeit security is likely to pose significantly different and more serious risks to the bank.

Affirmed.

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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 138

THE EXCHANGE NATIONAL BANK OF OLEAN,
Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX.

PAGE

Argument 1

The Petition fails to meet the test provided in Rule 19 or to show any other basis for granting certiorari 1

Petitioner's Argument for Review 2

Conclusion 5

Table of Cases.

First Nat'l Bank of Memphis v. Aetna Cas. & Sur. Co., 309 F. 2d 702 (6 Cir. 1962), cert. denied, 372 U. S. 953 (1963) 2, 3

Fitzgibbon Boiler Co. v. Employers' Liab. Assur. Corp., 105 F. 2d 893 (2 Cir. 1939) 2

Johnstown Bank v. American Sur. Co. of New York, 6 App. Div. 2d 4, 174 N. Y. S. 2d 385 (3d Dept.) *motion for leave to appeal denied,* 5 N. Y. 2d 705, 153 N. E. 2d 796, 179 N. Y. S. 2d 1026 (1958) 2, 3

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U. S. 387, 393 (1923) 3

North Carolina Nat'l Bank v. U. S. Cas. Co., 317 F. 2d 304 (4 Cir.), cert. denied, 375 U. S. 905 (1963) 2, 3

Prudential Capital Corp. v. Royal Indem. Co., 21 App. Div. 2d 664, 249 N. Y. S. 2d 728 (1st Dept. 1964) 3

Rice v. Sioux City Cemetery, 349 U. S. 70, 74 (1955) .. 4

Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 205, 206 (1938) 3

Van Dusen v. Barrack, 376 U. S. 612 (1964) 3

II.

PAGE

Waggaman v. General Finance Co., 116 F. 2d 254 (3 Cir. 1940) 4

RULE OF THIS COURT.

Rule 19 ..... 1, 2

IN THE

Supreme Court of the United States

October Term, 1964

No. 1164

THE EXCHANGE NATIONAL BANK OF OLEAN,
Petitioner,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

The Petition fails to meet the test provided in Rule 19 or to show any other basis for granting certiorari.

Rule 19 of this court, which is not mentioned in petitioner's application, provides the considerations governing review on certiorari. This rule, formulated more than 40 years ago, embodies the criteria developed prior to its adoption and followed by the court since, in determining whether a particular case merits the court's consideration. Review is not a matter of right, but discretion, and will be

granted "only where there are special and important reasons therefor."

Petitioner seeks to review the circuit court's unanimous affirmance of the district court's holding that petitioner was not entitled to recover under a bankers indemnity bond for certain defaulted loans. This is a dispute between particular litigants of private, not public, interest. The rights of the parties rest upon local law and circumstances and raise no important federal question. The case does not warrant review under Rule 19 or on any other basis urged in the petition. This court has twice previously declined to review similar cases raising the same question. *North Carolina Nat'l Bank v. U. S. Cas. Co.*, 317 F. 2d 304 (4 Cir.), cert. denied, 375 U. S. 905 (1963), and *First Nat'l Bank of Memphis v. Aetna Cas. & Sur. Co.*, 309 F. 2d 702 (6 Cir. 1962), cert. denied, 372 U. S. 953 (1963).

Petitioner's Argument for Review

First, petitioner claims that the Circuit Court of Appeals improperly "disregard[ed] the considered judgment of the New York Appellate Division" in interpreting the coverage under a bankers indemnity bond. The Circuit Court of Appeals citing its decision of *Fitzgibbon Boiler Co. v. Employers' Liab. Assur. Corp.*, 105 F. 2d 893 (2 Cir. 1939) which reviewed prior New York authorities, concluded that the instruments upon which petitioner suffered its loss were not "counterfeit" within the meaning of the bond. Referring in particular to Clause E of the bond, the Circuit Court of Appeals found the decisions of the First and Third Departments of the Appellate Division not wholly in agreement, *Johnstown Bank v. American Sur. Co. of New York*, 6 App. Div. 2d 4, 174 N. Y. S. 2d 385 (3d Dept.) *motion for leave to appeal denied*, 5 N. Y. 2d 705, 153 N. E. 2d 796,

179 N. Y. S. 2d 1026 (1958), and *Prudential Capital Corp. v. Royal Indem. Co.*, 21 App. Div. 2d 664, 249 N. Y. S. 2d 728 (1st Dept. 1964). The court rejected the bank's argument, made again here by the petitioner, that the First Department decision in the *Prudential Capital Corp.* case required a decision in its favor. Finding the law unsettled between the various departments, the Circuit Court of Appeals exercised its choice and adopted the rule of the Third Department in *Johnstown Bank.* In making this choice the court cited, amongst other authorities, *North Carolina Nat'l Bank v. U. S. Cas. Co.*, and *First Nat'l Bank of Memphis v. Aetna Cas. & Sur. Co., supra.*

Such a decision on a matter of state law involving a dispute between private parties in connection with an insurance contract issued and to be performed wholly within the state is not an important state question decided contrary to applicable state law. See *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 205, 206 (1938), and *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U. S. 387, 393 (1923).

Secondly, petitioner seeks review "in order to implement the principle enunciated by this court" with respect to change in venue. Although petitioner cites *Van Dusen v. Barrack*, 376 U. S. 612 (1964) which held there had been an improper change of venue, petitioner makes no such claim in the present case. With the contract written, performed and the loss occurring all in New York, the Circuit Court of Appeals quite properly found "no error in effecting this transfer" from the District Court of defendant's home office to the District Court in New York where the loss occurred. Petitioner argues, notwithstanding the admittedly proper change in venue, that certiorari should be granted

because under Pennsylvania, not New York, law petitioner claims it would have been entitled to judgment in its favor.

Regardless of where the case had been heard, New York law, as the Circuit Court of Appeals held, would have applied. The fact that the Appellate Division decisions in New York were not wholly in accord, does not mean that the Court was required to abandon the New York law for the law of Pennsylvania. *Waggaman v. General Finance Co.*, 116 F. 2d 254 (3 Cir. 1940) and other authorities cited by petitioner (page 11) do not support this view. The matter of coverage under the bond was controlled by local law and did not present "a federal question in a way in conflict with applicable decisions of this court."

The statement of this Court in *Rice v. Sioux City Cemetery*, 349 U. S. 70, 74 (1955) lays at rest both of petitioner's arguments for review. In discussing Rule 19 and the considerations governing review on certiorari this court, in *Rice v. Sioux City Cemetery*, said:

> "A federal question raised by petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (*Magnum Import Co. v. Coty*, 262 U. S. 159, 163; see also address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst., 313) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Conclusion

Petitioner has failed to show more than a private dispute between private parties with respect to insurance coverage under local law. Proper grounds for review on certiorari have not been established and the petition should be denied.

Respectfully submitted,

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